Supreme Court, U.S.
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No. 90-1430

In The

Supreme Court of the United States

October Term, 1990

NELSON R. RABY, et al.,

Petitioners,

versus

M/V PINE FOREST, *In Rem*, DELICA SHIPPING, S.A., and INUI STEAMSHIP CO., LTD.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondents' Counterstatement

I. Did the Court of Appeals err in ruling that a shipowner who has paid or tendered the wages demanded by seamen need not also tender all statutory penalties claimed by plaintiffs under 46 U.S.C. § 10313 in order to toll accrual of further statutory penalties?

II. Did the Court of Appeals err in ruling that, when the district court's opinion does not make it clear whether all wages were paid, and the opinion contains inconsistent statements about the amounts, if any, of additional wages due, the shipowner should have the option of tendering into court any disputed wages in order to stop the accrual of statutory penalties?

LIST OF ALL PARTIES TO THE PROCEEDING

Respondents' Correction

Petitioners have omitted from the list of parties to the proceeding below the name of plaintiff Associated Marine Officers and Seamen's Union of the Philippines, referred to more commonly in this case as AMOSUP.

In addition, eight of the persons named in this action as plaintiffs were named as plaintiffs by AMOSUP; and AMOSUP brought all claims on their behalf. There has been no evidence that any of them intended to join in this action or authorized or ratified the use of their names as plaintiffs. These persons are S. Galua, Bonifacio Tabada, Can L. Machete, Francisco F. Yabo, Guilberto A. Bete, G. Villarruel, Russel L. Silverio and Mario D. Cabiltan.

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COUNTER STATEMENT OF JURISDICTION

Respondents deny that the federal courts have jurisdiction of this action. No American citizen, domiciliary or corporation is a party to this dispute. The action is predicated on 46 U.S.C. § 10313 and admiralty jurisdiction. Respondents contend that the claim under 46 U.S.C. § 10313 is brought in bad faith and that the claims alleged to be maritime torts do not satisfy the locus requirement for admiralty jurisdiction, in that they occurred in part on land.

COUNTER STATEMENT OF THE CASE

This is an action by Filipino seamen and a Philippine labor union against a Vanuatu flag vessel, her Panamanian owners and a Japanese ship operator. Plaintiffs assert claims for wages, statutory penalties under 46 U.S.C. § 10313, fraud and blacklisting. Plaintiffs allege jurisdiction under 46 U.S.C. § 10313(i), which grants a foreign seafarer the right to sue in federal district court for wages and a statutory double-wage penalty while in a port of the United States.

In this case, the crew of the M/V PINE FOREST entered into written employment agreements with manning agent in Manila. The agreements were in the form prescribed by the Philippine government through the Philippine Overseas Employment Agency (POEA). The POEA established the contractual wage the seamen were to be paid. After the agreements were executed, they were approved by the POEA.

The seamen were hired to man the M/V PINE FOREST for one year. The crew sailed on the PINE FOREST from March 27, 1989 until January 31, 1990. Before the crew's contracts expired the ship was arrested in Tacoma, Washington by a lawyer from Baton Rouge, Louisiana named Richard J. Dodson.

There was no dispute below that the seamen had received all the wages due them each month under the POEA agreements they had signed. Their complaint alleged that they were entitled to more than this, however, because a wage higher than the POEA wage had been inserted into the shipping articles after the plaintiffs had signed them.

It had been a widespread practice for many years for flag of convenience vessels to hire Philippine seafarers on the understanding that they would receive the rate of pay specified in their POEA contracts, but would sign shipping articles and wage receipts reflecting a much higher rate, called the "ITF worldwide wage scale."[1] The practice had been instituted in response to a campaign by the International Transport Workers Federation (the ITF) and its affiliated unions to destroy flag of convenience shipping through boycotts and work stoppages at the ships' ports of call. (A "flag of convenience" is the means by which a shipowner "flags out" a ship to a foreign registry, such as Liberia or Panama, in order to crew the ship with seamen from countries other than the country of beneficial ownership.) The ITF, whose main constituency is Western European seamen commanding wages much higher than those received by Third World seamen, acts against vessels that pay wages lower than ITF worldwide wage scale. By making it just as expensive to employ a

Filipino crew as a British or Norwegian one, the ITF hopes to remove the economic advantages of flags of convenience.

The three seamen who testified at trial of this case admitted that, on this ship as well as others on which they had worked for other owners, they had agreed to sign two wage receipts each month, one reflecting their actual pay, the other reflecting the ITF worldwide wage. They also admitted that they had agreed to memorize this wage scale so that they could tell any ITF organizer who might board the ship that they were receiving ITF-approved wages.

The three seamen who testified also admitted that before signing the shipping articles they had been told they would receive the POEA wage. At trial, though, they contended that they had taken the figures in the shipping articles seriously, and had formed the belief that they were entitled to the ITF wage rate reflected in that document.

The claim under 46 U.S.C. § 10313 was based on the theory that the shipping articles were the controlling contract and that substantial back wages were due because the ITF worldwide wage rate written in that document had not been paid.

The action was commenced on January 30, 1990, by 11 individual crew members, who demanded $231,198.58

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[1] The ITF worldwide wage scale is an average of the wages paid to seafarers in the countries which own the highest percentages of the world's chipping tonnage.

as back wages and $2.3 million as the double wage penalty provided in 46 U.S.C. § 10313. Plaintiffs contended that statutory penalties accrued each time the ship completed a trip to either Japan or the United States. The ship was arrested on her fifteenth trip. Plaintiffs contended that as of that time, the statutory penalty amounted to 15 times plaintiffs' daily wage rate.

The first amended complaint, dated February 7, 1990, added two more individual plaintiffs, and demanded a total of $268,835.14 in back wages for the 13 individuals. A Philippine labor union, AMOSUP, was also added as a plaintiff. The union asserted a wage claim on behalf of its members for $160,744.96. The first amended complaint demanded $5.4 million in statutory penalties. The second amended complaint, dated February 12, 1990, made the same wage and penalty claims as the first amended complaint, and added additional claims for blacklisting and fraud.

On February 13, 1990, plaintiffs' counsel accepted defendants' tender to the individual – i.e., non-AMOSUP – plaintiffs of one check for $231,198.58 and another for $36,387.07, for a total of $267,585.65.[2]

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[2] Defendants took the position throughout the litigation that a claim for statutory penalties under 46 U.S.C. § 10313 was personal to the seaman and could not be asserted in a representative capacity by a foreign labor union. The claims asserted by the union were on behalf of individuals who refused to sign or otherwise verify the complaints, who signed dismissals of all claims, and who remained with the ship after the lawsuit was commenced, when the individual plaintiffs left. None of these individuals was ever deposed and none testified at trial.

At trial, plaintiffs' own witness, an economist named Randolph Rice, testified that the total of $267,585.65 tendered to these individual plaintiffs actually **overpaid** them the ITF wage scale by $15,610. Exhibit 1 (transcript of Rice trial testimony). This testimony was uncontradicted at trial. Despite this testimony the district court found that plaintiffs had been **underpaid** their wages by $15,019.20, *see* trial court's opinion, Petitioners' App., p. 46, Finding of Fact No. 20. Then, without explanation, the district court awarded these same plaintiffs a total of $23,696.08 in wages. *Id.*, Finding of Fact No. 33, Conclusion of Law No. 6. The record contains no explanation for this inconsistency. The court imposed statutory penalties for "nonpayment." The court also found that defendants' tender of $267,585.65 did not constitute a tender of wages because the tender did not include the millions in penalties which plaintiffs had also demanded. *Id.* at Finding of Fact 20. Accordingly, the court held that, despite the wage tender, penalties would continue to accrue until both wages and penalties were paid.

The trial court found for plaintiffs on every theory they advanced – including theories that were not included in the pretrial order and theories that were expressly excluded from the case prior to trial. The court entered a judgment for $32.6 million, and held that penalties continued to accrue. The judgment consisted of awards of $165,932.13 in additional wages, $6.9 million in statutory penalties, $17 million in punitive damages, $1.7 million for emotional distress, and $6.8 million for lost income. The court subsequently entered a judgment for $672,200 against defendants for attorney fees and costs.

Defendants moved immediately to set a supersedeas bond in an amount less than the judgment on the ground of severe financial hardship and offered to provide alternative security pending an appeal. Plaintiffs filed a motion requesting that the supersedeas bond be set at $59 million. The court granted plaintiffs' motion the same day.

Defendants filed an emergency motion asking the Court of Appeals to set aside the trial court's order and to reset the supersedeas bond. The Court of Appeals reversed the trial court's order setting supersedeas at $59 million for abuse of discretion. *Raby v. M/V PINE FOREST,* 918 F.2d 80 (9th Cir. 1990). The Court of Appeals held that defendants were not required to tender to plaintiffs both wages and claimed accrued penalties in order to stop the accrual of further penalties. The Court of Appeals also noted that approximately $19 million of the amount required for the supersedeas bond was attributable to penalty wages that the trial court expected to accrue during the pendency of the appeal. Because it was not clear from the record whether all wages had actually been paid, said the Court of Appeals, defendant should be given the opportunity to tender disputed wage amounts into court and thereby stop the accrual of further millions in penalties during the appeal.

The Court of Appeals instructed the District Court to determine on remand whether all back wages had actually been paid.

A hearing was held before the trial court on the matters that were remanded. While the hearing was in progress, the trial court urged the parties to settle the

bond dispute. The parties reached a settlement during a lunch break, and they read into the record their agreement that the supersedeas bond be set at $42,004,322. Despite this settlement agreement, plaintiffs filed the present petition for writ of certiorari.

The foregoing Statement of the Case is only a sketch of some of the facts and proceedings in this case. Defendants have attempted to give the Court just enough background for it to be aware that the case is far more complex than plaintiffs' petition suggests, and that any intervention in the proceedings at this point, before a decision by the Court of Appeals merits panel on full briefing, can have very serious unintended effects. The Court should be aware that defendants have identified over a hundred legal errors arising from substantive, procedural and evidentiary rulings of the trial court in this case.

WHY THE PETITION SHOULD BE DENIED

I. Assuming arguendo that the petition meets the requirements of Rule 10, it clearly does not meet the requirement of Rule 11: that a petition for writ of certiorari to review a case before judgment in the Court of Appeals will only be granted when the case is of "such imperative public importance as to justify deviation from normal appellate practice and to require immediate settlement in this court."

Plaintiffs acknowledge that they are seeking a writ of certiorari before judgment in the Court of Appeals. They recognize that they must meet the requirement of Supreme Court Rule 11 that the case must be of "such

imperative public importance as to justify deviation from normal appellate practice and to require immediate settlement in this Court."

Yet plaintiffs do not at any point argue, let alone demonstrate, that the issues they raise are of imperative public importance. The only argument they make is that there is a conflict in the circuits on the issues allegedly raised by the decision of the Court of Appeals motions panel and that uniformity on these issues is needed. If plaintiffs can establish this conflict and the need for uniformity on these issues, they would eventually become candidates for certiorari under Supreme Court Rule 10 after there has been a final judgment in the Court of Appeals. But a conflict in the circuits does not establish "imperative public importance." Obviously, not every conflict between the circuits rises to this level.

On its face there is no apparent urgency about resolving the issue of whether, after a payment of almost $300,000 in wages, a disputed $15,000 can be paid into court in order to toll the accrual of statutory penalties. There is certainly no showing that either foreign seamen or foreign shipowners have an extraordinary need to know this Court's opinion on this subject and to know it right away.

II. It is not clear that there is any conflict in the circuits.

The purported conflict in the circuits is between the Third and Fourth Circuits on the one hand, and the Eleventh Circuit on the other. In *Swain v. Isthmian Lines, Inc.*, 360 F.2d 81 (3rd Cir. 1966) and in *Southern Cross S.S.*

Co. v. Firipis, 285 F.2d 651 (4th Cir. 1960) *cert. denied*, 365 U.S. 869 (1961) the Third and Fourth Circuits held that wages could be tendered into court to toll the running of statutory penalties. The Eleventh Circuit, in *Chung Yong Il v. Overseas Navigation Co., Ltd.*, 774 F.2d 1043 (11th Cir. 1985) *cert. denied sub nom. Hibernia Nat'l Bank v. Yong Il Chung*, 475 U.S. 1147 (1986) (White, J., dissenting) held that a bond posted to obtain release of an arrested vessel was not sufficient to toll the running of statutory penalties.

The Ninth Circuit cited *Swain* and *Southern Cross* when it held that, because the record was not clear on whether wages had been paid in full to the plaintiffs, defendants should have been given the option of tendering the disputed wages into court.

It is not necessary to interpret the decision of the Court of Appeals in the present case as declaring a general rule that a shipowner may always pay back wages into court in order to stop the running of penalties under 46 U.S.C. § 10313(f). This is an extraordinary case. It is still not clear how much in back wages the trial court thought was due, nor how much was in fact paid to plaintiffs by their lawyer. There is no way to know what the Court of Appeals will ultimately determine to be "sufficient cause" for not paying the ITF worldwide wage scale. The cases from the Third, Fourth and Eleventh Circuits did not involve facts anything like these. Accordingly, it is by no means clear that those courts, faced with facts like those in this case, would not have reached the same result as the Ninth Circuit did.

The appeal on the merits now pending before the Ninth Circuit will present the issues raised in the supersedeas proceedings as well as those raised by the trial, and it will present them in a complete, ordered, factual setting. When this case has made its way through the Court of Appeals on the merits it might present questions which would justify a writ of certiorari. It is too soon to tell.

III. Since plaintiffs settled with defendants on the amount of the supersedeas bond, they necessarily abandoned their right to further appeal the Court of Appeals' decision.

On January 28, 1991, plaintiffs stipulated to a bond for $42,004,322 as adequate security. The bond was executed by defendants on January 30, 1991, and approved by the district court on February 5, 1991. The bond remains in effect during the appeal in the Court of Appeals. The amount of bond required to stay execution of the judgment is now moot.

CONCLUSION

The Supreme Court should deny the petition because:

1. The interlocutory ruling by the Court of Appeals is not of such imperative public importance as to justify deviation from normal appellate practice and to require immediate settlement in this court.

2. It is not clear that there is any conflict among the circuits, and if there were, the record is too factually undeveloped to resolve that conflict.

3. Since plaintiffs have stipulated to the amount of the supersedeas bond, they have waived their right to appeal the Court of Appeals' decision.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

NELSON R. RABY, et al., Plaintiffs, v. M/V PINE FOREST, *In Rem*, DELICA, SHIPPING, S.A.; and INUI STEAMSHIP CO., LTD., Defendants.	USCA No. USDC No. C90-5038T Tacoma, Washington May 21, 1990

VERBATIM TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE JACK E. TANNER
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the 13 Plaintiffs:	RICHARD J. DODSON THOMAS E. RICHARD SCOTT M. STICKNEY JOHN W. MERRIAM
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For the Defendants:	JOSEPH S. STACEY RICHARD J. C. MORGAN PAUL N. WONACOTT KATHLEEN McKEON
Court Reporter:	PAUL J. FREDERICKSON

Proceedings recorded by mechanical stenography, transcript produced by computer.

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* * *

RICE-Cross

[p. 91] Q. Now, I believe when we had your deposition at Baton Rouge that there was a calculation that showed that the men were overpaid by $15,000; is that correct?

A. Yes.

Q. Okay. Where is that shown?

A. I don't – I didn't prepare this booklet, so I haven't seen it today.

MR. DODSON: Mr. Stacey, I gave you those figures and you were to put them in the notebooks. I would stipulate that they should go in the notebooks. If they didn't go in, they should be added. There was a calculation, a few men were underpaid and a few were overpaid, and if you add them in the notebook, then we will stipulate that was Dr. Rice's testimony.

MR. STACEY: Well, I think we can do that right away.

MR. DODSON: I want everything from the deposition in [p. 92] the notebook, and it was supposed to be in the notebook.

MR. STACEY: Your Honor, is he addressing me?

MR. DODSON: Yes, I am.

THE COURT: Let's not have the interchange between counsel.

Is there something to Plaintiffs' Exhibit 6 that should be added to Plaintiffs' Exhibit 6?

MR. STACEY: I believe I have it here, Your Honor.

MR. DODSON: You have part of it. We we agreed and stipulated that everything from his figures in Baton Rouge to be put in the notebook. If they're not in there –

THE COURT: Just a moment, just a moment, counsel.

If you have something additional you want to do, give it to the witness. If he can identify it and recognizes where it comes from, the plaintiff or defendant, I'm going to admit it as part of Plaintiffs' 6.

MR. STACEY: May I approach the witness, Your Honor?

THE COURT: Yes.

MR. STACEY: Thank you.

Q. I'm showing the witness what is marked Balance of Wages Due, No. 3 Exhibit, Rice.

Do you recognize that document, please, sir?

A. Yes.

Q. And was that prepared by you?

A. With my knowledge, yes, sir.

[p. 93] Q. Okay. And what does that document represent?

A. Of the wages that were paid originally, those that were ultimately paid, and so the balance due is a comparison of how those numbers stack up against each other. And you're correct that in total, for the 13, Mr. Dodson's clients, there is an overpayment of $15,610.78.

Q. Okay. And what scale did you use?

THE COURT: Are you offering it?

MR. STACEY: Yes, please, Your Honor.

THE COURT: It will be known as Plaintiffs' 6-A.

MR. STACEY: Thank you.

[Plaintiffs' Exhibit 6-A admitted.]

Q. What did you use for a scale on Exhibit 6-A?

A. The wage rates?

Q. Yes, what contract?

A. ITF.

Q. ITF?

A. Yes, I'm sorry.

Q. So on the ITF contract scale the defendants overpaid the plaintiffs by a sum of $15,000, was that your calculation, sir?

A. As presented to me, yes.

Q. Was that presented, that information that you used to derive that overpayment figure, given to you by the plaintiffs' lawyer, Mr. Dodson?